Supreme Court, U.S.
FILED
SEP 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2160

In The
Supreme Court of the United States
October Term, 1986

TOWN NORWOOD,

Petitioner,

vs.

UNCOMPAHGRE VALLEY WATER USERS ASSOCIATION, MONTROSE PARTNERS, FEDERAL ENERGY REGULATORY COMMISSION, AND DEPARTMENT OF THE INTERIOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER, TOWN OF NORWOOD, TO BRIEF IN OPPOSITION FOR THE FEDERAL ENERGY REGULATORY COMMISSION AND FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

Statement 1

Argument 2

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES CITED:

Chapman v. FPC, 345 U.S. 153 (1953) 3, 8, 9

STATUTES CITED:

Act of April 16, 1906, section 5, 34 Stat. 117, 43 U.S.C. 522 2

Federal Power Act of June 10, 1920, 41 Stat. 1063, 16 U.S.C. 791a *et seq.* 3, 6, 7

16 U.S.C. 797 7

16 U.S.C. 814 6

Act of June 22, 1938, 52 Stat. 941 3

Act of August 16, 1962, section 1, 76 Stat. 389, 43 U.S.C. 616 3

National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 4

Department of Energy Organization Act of 1978, 42 U.S.C. 7152(1)(E) and 7152(3) 8

OTHER AUTHORITIES CITED:

FERC Regulations 4.33 and 4.36 under the Federal Power Act in 18 C.F.R. 9

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STATEMENT

The petition for writ of certiorari was filed on June 27, 1986. A brief in opposition for the Federal Energy Regulatory Commission and for the United States as

amicus curiae was filed in typewritten form on August 29, 1986. A printed copy of said brief was filed on September 5, 1986.

The Uncompahgre Valley Water Users Association and the Montrose Partners have not filed any brief in opposition to the petition of Norwood.

ARGUMENT

I. THE TENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

Petitioner disagrees with the position of the United States that this case does not present an important issue of federal law and that the decision of the Tenth Circuit applies only to one reclamation site.

The Tenth Circuit's ruling relied upon the principle that specific legislation should control over general legislation with regard to hydropower development authority on a reclamation project. However, the Tenth Circuit failed to define the extent of the specificity required or to provide any policy guidelines.[1]

If that simple ruling is allowed to remain, it will be natural for Interior to next argue before the Tenth Circuit that the Act of April 16, 1906, section 5, 34 Stat.

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1. The Tenth Circuit refused to grant FERC additional time in order to petition for re-hearing. Said petition for re-hearing by FERC may have provided valuable administrative input as to the ramifications of the ruling of the Tenth Circuit.

117, 43 U.S.C. 522, is specific with respect to the "subject matter" of development of hydropower on reclamation sites and as such should control over the Federal Power Act of June 10, 1920, 41 Stat. 1063, 16 U.S.C. 791a *et seq.*

This result will completely frustrate the scheme established by Congress under the Federal Power Act for the comprehensive administration of hydropower development, will undermine the holding of this Court in *Chapman v. FPC,* 345 U.S. 153 (1953), and will create chaos for the development of hydropower, particularly its financing. The only difference between the 1906 act and the act of June 22, 1938, 52 Stat. 941, for purposes of applying the holding of the Tenth Circuit, is that the latter refers to a specific project (but note, not a specific site within the project).

However, almost every reclamation project in the western United States has had some specific legislation enacted for it—often times concerning some aspect of hydropower development. Under the simplistic holding of the Tenth Circuit, it appears that if there is specific legislation concerning the "subject matter" of hydropower development, the authority to administer such development is vested with Interior. For some examples of the mischief this ruling will create note the two projects mentioned in the petition (Pet. 9 at footnotes 4 & 5). Also note the Ruedi dam for which FERC has already issued a license on September 8, 1983, to the City of Aspen and County of Pitkin (FERC Project No. 3603) and the act of August 17, 1962, section 1, 76 Stat. 389, 43 U.S.C. 616 wherein specific mention is made of hydropower construction.[2] Failure of this

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2. If further time were available for research, this petitioner is confident additional examples would be uncovered revealing the chaos the ruling of the Tenth Circuit creates for hydropower development.

Court to review and reverse the ruling of the Tenth Circuit will result in continued uncertainty as to which agency has the authority over the development of hydropower at these sites.

Additionally, FERC as repeatedly stated in the brief in opposition, disagrees with the ruling of the Tenth Circuit. Without a ruling from this Court settling the law of the authority of FERC versus Interior at reclamation sites, the likelihood of repeated litigation before other Circuit Courts for other sites on the issue of specificity is great.

During the pendency of all these suits, private capital will be unwilling to pursue hydropower development via FERC, thus frustrating the intent of Congress expressed in the Federal Power Act to maintain a continued inducement to private capital for financing hydropower development.

II. ANY ACTION BY INTERIOR THAT WOULD MOOT THE CONTROVERSY IS YEARS AWAY

Petitioner disagrees with the position of the United States that developments by Interior may soon moot the present controversy.

Construction or contracting with regard to hydropower development on the Uncompahgre Project requires compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* At this time for the Uncompahgre Project a draft Environmental Statement has yet to be prepared by Interior. After the draft is prepared and issued, there must be a comment period (at least 60 days) and review before issuance of a final statement. After the NEPA process, and if a decision is made to pro-

ceed with hydropower development, it appears that Interior then must follow its own established procedures. (Pet. 23). These procedures can require a substantial period of time. Finally funding must be obtained, which most likely will not be forthcoming until there is resolution of all controversies, including the action before this Court.

Note also that for the Uncompahgre Project, Interior at this time appears to be proceeding with a configuration for hydropower development which requires the procurement of rights-of-way over 157.0 acres of private land, 15.0 acres of municipal land, and 2.0 acres of state land all in addition to 16.3 acres of land under the actual control of the Bureau of Reclamation.[3] Said procurement of non-federal rights in the near future by Interior for hydropower development without having the specific statutory right for eminent domain is problematical.

III. LICENSING BEFORE FERC MAY BE THE FASTEST METHOD FOR HYDROPOWER DEVELOPMENT TO OCCUR AT THE UNCOMPAHGRE PROJECT

With respect to hydropower development at the Uncompahgre Project before FERC, FERC has been prohibited from proceeding on the matter by a mandate of the Tenth Circuit issued April 15, 1986. FERC complied with the mandate in its "Order Dismissing Applications"

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3. See License Application before FERC filed by the Uncompahgre Valley Water Users Association and Montrose Partners in December 1984 for the AB Lateral Hydro Project (FERC Project No. 8839-000) at page A-11.

issued May 30, 1986. However, in said order, FERC held that it would reinstate the license and permit applications to their status as of before the order of the Tenth Circuit, if the United States Supreme Court should reverse the jurisdictional holding of the Tenth Circuit.

License applications for the Uncompahgre Project containing full adequate environmental impact statements have already been submitted to FERC and the applicable comment period for the statements has expired. Furthermore, under the Federal Power Act of June 10, 1920, eminent domain is provided in section 21, 41 Stat. 1074, 16 U.S.C. 814. Accordingly, it appears that except for the ruling of the Tenth Circuit, the fastest track for development of hydropower on the Uncompahgre Project is via FERC and private funding. In contrast, note Interior has had authorization under the 1983 act for nearly fifty (50) years without being able to develop the hydropower potential at the Uncompahgre Project.

IV. ALLOWING THE TENTH CIRCUIT RULING TO STAND WILL WORK GREAT ECONOMIC HARDSHIP UPON THE REGION

The determination of who will administer the hydropower development upon the Uncompahgre Project (FERC or Interior) will affect nearly 500 residents of the Town of Norwood in terms of their tax liabilities to the town and the town's ability to provide municipal services for the region. The projected annual profits from hydropower development on the Uncompahgre Project range from $800,000.00 to $6,000,000.00 (depending on the configuration analyzed) at present interest and power purchase rates. Such income, particularly if repeatedly re-spent

within the region, will provide a substantial financial boost to a presently economically depressed area.

However, Mitex Inc. of Boston, the former developer for the Uncompahgre Valley Water Users Association, has sold its full interest in the Uncompahgre Project to the Sithe/Energies Group. Sithe is an offshore affiliate to a French organization known as Compagnie Generale Des Eaux located in Paris. The result is that if Interior prevails in this controversy with its contract with the Uncompahgre Valley Water Users Association over 80% of the profits derived from the hydropower produced on the Uncompahgre Project will be severed from the region and the United States in favor of French investors. It is anomalous that Interior, which is empowered under the federal reclamation laws to foster and develop national water resources, is now party to a scheme to siphon off an unreasonable and disproportionate share of a project's profits to a foreign interest.

This exportation of profits to a foreign entity runs contra the intent of Congress to promote development of national power resources by citizens and entities of the United States as expressed in section 4(e) of the Federal Power Act of June 10, 1920, 41 Stat. 1065, 16 U.S.C. 797.

V. THE AUTHORITY OF INTERIOR TO EXCLUSIVELY ADMINISTER THE UNCOMPAHGRE PROJECT IS UNDERMINED BY THE DEPARTMENT OF ENERGY ORGANIZATION ACT WHICH TRANSFERRED THE POWER MARKETING FUNCTIONS OF THE BUREAU OF RECLAMATION, DEPARTMENT OF THE INTERIOR, TO THE DEPARTMENT OF ENERGY

The ruling of the Tenth Circuit hinged upon the grant to Interior in the 1938 act of authority to contract and sell surplus power. Under the Department of Energy Organi-

zation Act of 1978, all power marketing functions of Bureau of Reclamation, Department of the Interior, are transferred to the Department of Energy (DOE). See 42 U.S.C. 7152(1)(E) and 7152(3).

This transfer implies that the specific grant of contracting authority to Interior over surplus power contained in the 1938 act has been terminated. Thus under the reasoning of the Tenth Circuit, there would be no basis to find that Interior has any authority over the development of hydropower on the Uncompahgre Project.[4]

VI. THE ARGUMENT OF THE UNITED STATES THAT THE CHAPMAN CASE IS DISTINGUISHABLE IS FLAWED

The brief of the United States incorrectly argues that the holding in *Chapman v. FPC*, 345 U.S. 153 (1953) is distinguishable from this case simply because there is a specific statute for the Uncompahgre Project. This position is flawed and the *Chapman* case applies for the following reasons, among others: (1) *Chapman* examined the extent of specificity required to divest FERC's authority and focused upon clear and final congressional action which included a site plan and authorization of federal funding. A site plan and federal funding is not included in the 1938 act; and (2) *Chapman* required authorization of actual construction to divest FERC of authority whereas the 1938

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4. In conversations with DOE personnel, this author has been informed that DOE does not now or in the future intend to develop any hydropower projects.

act only concerns authorization regarding contracting of surplus power—a much more limited congressional grant.[5]

Chapman held at page 160 that the decisive matter in analyzing a specific statute is to note how Congress may fairly be said to have received and read the statute in light of its current legislative practices in relation to public works. As set forth in the petition, particularly in footnotes 9, 10 and 11 (Pet. 14-15), the 1938 act does not call for public construction nor provide for clear and final congressional action in light of the legislative practices of 1938.

VII. THE ARGUMENT OF THE UNITED STATES REGARDING COLOR OF AUTHORITY BEGS THE QUESTION OF CONCURRENT AUTHORITY OF FERC AND INTERIOR

The validity of the licenses and preliminary permits previously issued by FERC for reclamation projects with specific statutes containing "subject matter" on hydropower (Uncompahgre, Grand Valley, and Ruedi) will remain unresolved if the ruling of the Tenth Circuit is not reversed by this Court. The only remedy advanced by the United States to correct the dilemma is to suggest that FERC's prior actions may be valid under color of authority. However, no citation is presented for that proposition.

Allowing for the moment that the position has validity, it begs the question of when does the color of author-

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5. The 1938 act contemplates construction by the United States, if any only if, there is a contract for the sale of surplus power. This requires a financing package from a private entity. Compare footnote 5 of the brief of the United States (Brief 7-8) with the text and footnotes of the petition at pages 13-15.

ity vest? A logical position would be that FERC's authority vests once the comment and competition period has terminated for any given site. See FERC Regulations 4.33 and 4.36 under the Federal Power Act in 18 C.F.R. In that case, the possibility of Interior asserting authority over the Uncompahgre sites would have terminated on January 7, 1985, when the comment and competition period before FERC ended. However, Interior first raised the issue of its authority in its letter dated May 6, 1985, some 120 days after the close of that period.

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CONCLUSION

The brief of the United States is notable for its omissions. It basically fails to address the arguments and authorities presented in the petition. Instead, it primarily relies upon the concepts of 1) mootness and 2) narrowness of issues presented.

However, as noted above, the issue before this Court will not be rendered moot by any foreseeable actions of Interior and the federal issue presented herein does transcend beyond the limits of the Uncompahgre Project, thus requires settlement by this Court.

Accordingly, Norwood respectfully request that this petition for writ of certiorari be granted.

Respectfully submitted,

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September 1986